

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY E. PERELMAN	:	CIVIL ACTION
	:	
v.	:	
	:	
RAYMOND G. PERELMAN, ET AL.	:	NO. 10-5622

MEMORANDUM

Padova, J.

August 3, 2011

In this ERISA action, Plaintiff Jeffrey Perelman alleges that Defendants, the trustees and administrators of the General Refractories Company Plan for Salaried Employees (the “Plan”), invested Plan assets in Revlon corporate bonds for improper purposes and failed to make complete and accurate disclosures to Plan participants, in breach of their fiduciary and statutory duties.¹ Plaintiff seeks an order directing Defendants to restore to the Plan any losses suffered by the Plan and any profits realized by Defendants, as well as various forms of injunctive relief. Before the Court is Defendants’ Motion to Stay Discovery pending a decision on Defendants’ Motion for Summary Judgment, which asserts that Plaintiff lacks standing to bring this suit. For the reasons that follow, we grant Defendants’ Motion to Stay insofar as it seeks to limit discovery to the issue of standing until we have decided Defendants’ Motion for Summary Judgment.

“The decision to stay discovery pending resolution of a potentially dispositive motion is within the discretion of the district court.” Babalola v. Donegal Mut. Ins. Co., Civ. A. No. 08-612, 2008 WL 5278393, at *1 (M.D. Pa. Dec. 18, 2008) (citing Coastal States Gas Corp. v. Dep’t of Energy, 84 F.R.D. 278, 282 (D. Del. 1979), and In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344, 365 (3d Cir. 2001)). The burden is on the party seeking the stay to show “good cause.”

¹In the interest of precision, we note that Plaintiff also complains of a February 1, 2008 investment of \$2.7 million in Revlon corporate debt.

19th Street Baptist Church v. St. Peters Episcopal Church, 190 F.R.D. 345, 348 (E.D. Pa. 2000) (citation omitted); see also Fed. R. Civ. P. 26(c). In the end, “a stay is proper where the likelihood that [the pending] motion may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay.” Weisman v. Mediq, Inc., Civ. A. No. 95-1831, 1995 WL 273678, at *2 (E.D. Pa. 1995) (citation omitted). In order to measure the likelihood that a pending motion may result in a narrowing or outright elimination of discovery, we need not “form[] an opinion as to the merits” of the motion. Id. Rather, we consider the scope of the motion and ask whether it “may potentially lead to” the end of the case, and whether it will provide the parties with “full knowledge as to which claims are viable and, correspondingly, as to what discovery need occur.” Id. We “balance the competing interests of each party to determine whether the benefits of [the] stay outweigh the likely harm to the plaintiff.” Babalola, 2008 WL 5278393, at *1. In deciding whether the balance of factors favors a stay, we consider (1) the scope of the pending motion; (2) the breadth of the non-party discovery underway; (3) the harm and expense to which continued discovery would subject the movant or third parties; and (4) the harm that a delay in discovery would cause for the non-movant. See Weisman, 1995 WL 273678, at *2.

Defendants argue that a stay is warranted because Plaintiff has been mounting “a wide-ranging and abusive discovery campaign” against not only Defendants but also “any entity even remotely associated with the Plan,” including Defendants’ various “businesses and charitable foundations.” (Defs.’ Mem. in Support of Mot. to Stay at 2.) Defendants state that Plaintiff has served 120 document requests on Defendants and has served 18 third-party subpoenas. (Id. at 4.) Defendants argue that “the substance of [Plaintiff’s] third-party subpoenas demonstrates that he is using this case -- and the broad subpoena powers enjoyed by a litigant in a federal lawsuit -- as a

means to burden anyone associated with the Plan,” as part of a larger effort to “pressure his father and brother into resolving other legal actions pending between the parties.” (*Id.* at 5.) For example, Defendants state that Plaintiff has served “[a] subpoena to New York Life, which administers an annuity contract purchased by the Plan in the mid-1980s and as to which there is no allegation of wrongdoing,” as well as “[s]ubpoenas nominally directed to two charitable foundations that, in substance, request every communication between those foundations and various entities with which [Defendant] Ronald Perelman is associated, without any limit as to subject matter.” (*Id.* at 5.) Defendants argue that “[s]taying discovery would prevent [Plaintiff] from abusing the discovery process and avoid the significant expenses -- and discovery disputes -- that [Plaintiff’s] scorched earth discovery campaign no doubt will engender.” (*Id.* at 2.) Defendants principally seek an order staying all discovery but argue, in the alternative, that discovery should be limited to the issue of standing until the Motion for Summary Judgment is decided.

Plaintiff opposes Defendants’ Motion to Stay Discovery on several grounds. Plaintiff argues that he has directed his discovery toward information that is relevant either to the Plan’s assets and liabilities or to the theories of recovery set forth in Plaintiff’s Second Amended Complaint, which is now the operative Complaint. Plaintiff further argues that discovery has not been unduly burdensome to third parties. Plaintiff states that, of the eighteen third parties served with subpoenas, only six have asserted blanket objections, and all six are represented by the attorneys who represent Defendants in this matter. Plaintiff also states that he has worked amicably to resolve objections raised in connection with other third party subpoenas. Plaintiff also argues that a temporary stay would only delay but could not eliminate the costs and expenses of discovery, because at least some of his claims are likely to survive summary judgment.

As we discussed above, we need not determine, at this juncture, whether any of Plaintiff's claims are likely to survive summary judgment. See Weisman, 1995 WL 273678, at *2. We ask merely whether Defendants' Motion for Summary Judgment could narrow the issues in this case and correspondingly narrow discovery. Id. Accordingly, we consider the scope of the Motion, without forming an opinion as to its merits. Id. In the Motion for Summary Judgment, Defendants argue that Plaintiff only has standing if there is some risk that he will not be paid his monthly pension benefit as it comes due, that record evidence conclusively establishes that the Plan is fully funded, and that consequently Plaintiff lacks standing to proceed. In opposition to Defendants' Motion for Summary Judgment, Plaintiff argues that he is entitled to discovery with respect to the funding status of the Plan, that the documents already turned over demonstrate that there is a genuine issue of material fact with respect to the funding status of the Plan, and that he can proceed on his requests for injunctive relief even if record evidence does establish that the Plan is fully funded.

Having reviewed the Motion for Summary Judgment, we conclude that, even if the Motion is not granted in its entirety, a partial grant of summary judgment may potentially narrow the issues in this case and correspondingly narrow discovery. While we express no opinion on the merits of the Motion at this time, if we were to conclude that Plaintiff is required to make a showing of individual harm in order to seek restitution and disgorgement to the Plan, and if we were further to conclude that Plaintiff cannot make such a showing, the resulting partial grant of summary judgment could eliminate the need for discovery on losses suffered by the Plan and profits made by the fiduciaries. Accordingly, we conclude that the scope of Defendants' Motion for Summary Judgment weighs in favor of the conclusion that a stay is warranted. See Weisman, 1995 WL 273678, at *2 (concluding that a stay was warranted where resolution of dispositive motion could "potentially lead

to” the end of the case and would certainly provide the parties with “full knowledge as to which claims are viable and, correspondingly, as to what discovery need occur”).

With respect to the breadth of non-party discovery underway, Defendants argue that Plaintiff’s non-party discovery has been not only broad but “abusive.” (Defs.’ Mem. in Support of Mot. to Stay at 2.) A motion to stay discovery is not the proper vehicle in which to challenge the appropriateness of Plaintiff’s discovery requests to third parties. We do note, however, that Plaintiff has engaged in broad non-party discovery, that six of eighteen third parties served with subpoenas have asserted blanket objections, and that, accordingly, a stay “will potentially save time and money for all concerned.” Id. Accordingly, we conclude that both the breadth of non-party discovery underway and the expense of continued discovery weigh in favor of the conclusion that a stay is warranted.

Finally, we consider the harm or prejudice that a stay would create for Plaintiff. Plaintiff emphasizes, both in his response to Defendants’ Motion to Stay Discovery and in his response to Defendants’ Motion for Summary Judgment, that he has not yet received sufficient discovery to demonstrate his standing.² Because Defendants have chosen to challenge Plaintiff’s standing by means of a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, Plaintiff is entitled to discovery that is “essential to justify [his] opposition.” See Fed. R. Civ. P. 56(d). As we discussed above, Defendants’ Motion for Summary Judgment may require us to determine whether there is a genuine issue of material fact with respect to the Plan’s ability to pay Plaintiff’s monthly pension benefit as it comes due. Plaintiff is entitled to discovery on that factual issue. See

²Plaintiff states that he has not yet had an opportunity to depose the purported experts whose affidavits Defendants attached to their Motion for Summary Judgment, and that he also has not yet received a number of documents from third parties.

Fed. R. Civ. P. 56(d). Accordingly, we conclude that a general stay of all discovery is not appropriate. C.f. Weisman, 1995 WL 273678, at *2 (concluding that a stay should “not allow defendants to avoid their responsibility to produce their self-executing discovery” because the plaintiff was “entitled” to such discovery). However, Plaintiff has not made any argument that he would be prejudiced by a stay of all discovery not pertaining to the funding status of the Plan until the standing issue is resolved, and we can perceive no basis for such an argument. Accordingly, we conclude that the final factor – the likely harm or prejudice to Plaintiff – weighs in favor of the conclusion that a limited stay is warranted. C.f. id. (concluding that a stay of all discovery other than the defendants’ self-executing disclosures was appropriate where the Court “d[id] not find that plaintiff will be prejudiced . . . in any significant way” by such a stay).

For the foregoing reasons, we conclude that a temporary, limited stay of discovery is appropriate in these circumstances. “Indeed, such a procedure is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.” Coastal States Gas Corp. v. Dep’t of Energy, 84 F.R.D. 278, 282 (D. Del. 1979) (citations omitted). Discovery may continue only as it pertains to the factual issue of whether there is a genuine issue of material fact with respect to the Plan’s ability to pay Plaintiff’s monthly pension

benefit as it comes due.³ All other discovery shall halt until further Order of this Court.

An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

³Although summary judgment will also involve the legal issue of whether Plaintiff is required to show that there is some risk he will not be paid his pension benefit as it comes due – that is, whether Plaintiff is required to show individual harm – in order to seek restitution and disgorgement to the Plan and in order to seek injunctive relief, we see no need for discovery on that issue.